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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 NICHOLE W.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

Case No. C18-5701 RAJ

**ORDER AFFIRMING THE
COMMISSIONER'S FINAL
DECISION AND DISMISSING THE
CASE WITH PREJUDICE**

13 Plaintiff seeks review of the denial of her application for Supplemental Security Income.
14 Dkt. 16. As discussed below, the Court **AFFIRMS** the Commissioner's final decision and
15 **DISMISSES** the case with prejudice.

16 **BACKGROUND**

17 Plaintiff is currently 39 years old, has at least a high school education, and has worked as
18 a customer service clerk/stock clerk and as a retail store manager. Dkt. 13, Admin. Record (AR)
19 34. Plaintiff applied for benefits in May 2014, alleging disability as of June 9, 2007. AR 97.
20 Plaintiff's application was denied initially and on reconsideration. AR 92, 107. After the ALJ
21 conducted a hearing in September 2016, the ALJ issued a decision finding Plaintiff not disabled.
22 AR 41, 25-36.

23 ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,¹ the ALJ found:

Step one: Plaintiff has not engaged in substantial gainful activity since the May 2014 application date.

Step two: Plaintiff has the following severe impairments: radiculopathy, migraine headaches, and perineural cyst.

Step three: Plaintiff's impairments do not meet or equal the requirements of a listed impairment.²

Residual Functional Capacity: Plaintiff can perform light work, standing and walking two hours per day and sitting six hours per day. She can lift, carry, push, or pull 20 pounds occasionally and 10 pounds frequently. She can frequently balance and can occasionally stoop, kneel, crouch, crawl, and climb ladders, ropes, scaffolds, ramps, and stairs. She can have no exposure to vibration, extreme cold or heat, or concentrated airborne irritants. She can have moderate exposure to noise.

Step four: Plaintiff cannot perform past relevant work.

Step five: As there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, she is not disabled.

AR 27-36. The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the Commissioner's final decision. AR 7.³

DISCUSSION

Plaintiff asks the Court to reverse the ALJ's decision. Dkt. 14. The Court may reverse the ALJ's decision finding a person not disabled "only if it is not supported by substantial evidence or is based on legal error." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The Court cannot make its own findings, but must

¹ 20 C.F.R. § 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

³ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 consider the entire record as a whole in determining whether the Commissioner’s conclusions
2 have a reasonable basis. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003); *Robbins v. Soc.*
3 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). Additionally, where a party proceeds pro se, the
4 Court must construe the allegations of the pleading liberally and afford her the benefit of any
5 doubt. *See Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc). This Court may
6 not reverse an ALJ’s decision because of an error that is “harmless,” *i.e.*, “inconsequential to the
7 ultimate disability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1117 (9th Cir. 2012).

8 **A. Mental Impairments**

9 The ALJ found that Plaintiff’s anxiety and depression were nonsevere because Plaintiff
10 improved with treatment. AR 27. Plaintiff acknowledges that “depression ... was not something
11 that prevented [her] from working.” Dkt. 16 at 15. She contends, however, that she is “still
12 having issues” with panic attacks. Dkt. 16 at 7.

13 Evidence that medical treatment helped a claimant “‘return to a level of function close to
14 the level of function they had before they developed symptoms or signs of their mental
15 disorders’ ... can undermine a claim of disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876
16 (9th Cir. 2017) (quoting 20 C.F.R. Pt. 404, Subpt. P, App’x 1 (2014)). The ALJ relied on
17 Plaintiff’s report to her treating provider that her “[a]nxiety and depression [were] pretty well
18 controlled” in October 2014, and on the opinions of examining doctor John Adler, Ph.D., that
19 Plaintiff had normal capabilities in activities of daily living, social functioning, and
20 concentration. AR 1424; AR 1083. This was substantial evidence supporting the ALJ’s findings
21 that treatment returned Plaintiff to a level of function close to normal.

22 Plaintiff argues Dr. Adler’s opinions should be rejected because he only examined her
23 one time and her “treating mental health professionals have a better understanding of” her mental

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 health impairments. Dkt. 16 at 17, 6. A treating physician's opinion is generally entitled to
2 greater weight than an examining physician's opinion. *Garrison v. Colvin*, 759 F.3d 995, 1012
3 (9th Cir. 2014). However, when a treating doctor's and an examining doctor's opinions conflict,
4 the ALJ may accept one and reject the other by giving "specific and legitimate" reasons. *Id.*

5 Plaintiff does not identify any treating provider's opinions of her mental health, and none
6 are apparent from the record. At a February 2014 Intake Assessment from Community Services
7 Northwest, a thorough mental status examination revealed entirely normal results except for
8 restless motor activity. AR 966. Plaintiff had normal appearance, behavior, mood, affect, stream
9 of mental activity, thought content, memory, attention and concentration, comprehension and
10 fund of general knowledge, insight, judgment, and intelligence. *Id.* These findings are
11 consistent with Dr. Adler's findings and support rather than contradict his opinions.

12 The Court concludes the ALJ did not err by finding Plaintiff's mental impairments
13 nonsevere.

14 **B. Plaintiff's Symptom Testimony**

15 Plaintiff testified that she stopped working in June 2007 because of continuous pain in
16 her lower back, legs and feet. AR 48. Moving her arms frequently induces the back and leg
17 pain. AR 57. She can lift 20 pounds maximum on a normal day and 10 pounds on a bad day.
18 AR 50. She can only walk one block, stand 10 minutes, or sit 10 minutes before needing to rest.
19 AR 49. She gets daily headaches that last two to eight hours. AR 49-50. She gets 20-minute
20 panic attacks three or four times a month, or when she has appointments or is around more than
21 10 people. AR 51. She takes daily naps lasting one or two hours. AR 52. Mood swings make it
22 difficult to get along with other people. AR 52-53. Pain makes it difficult to focus. AR 53.

23 Where, as here, an ALJ finds the claimant's impairments could reasonably be expected to
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 cause her symptoms and there is no affirmative evidence of malingering, the ALJ can only reject
2 the claimant's symptom testimony for specific, clear and convincing reasons supported by
3 substantial evidence. *Garrison*, 759 F.3d at 1014-15. The ALJ discounted Plaintiff's testimony
4 as contradicted by her activities, conservative treatment, and minimal objective clinical findings.
5 AR 31-32. Plaintiff does not challenge the objective findings basis, but in any case "subjective
6 pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective
7 medical evidence...." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

8 **1. Activities**

9 An ALJ may discount a claimant's testimony based on daily activities that contradict her
10 testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The ALJ cited activities of caring
11 for three children ages 6 to 16, cleaning, cooking, laundry, driving, shopping, handling finances,
12 part-time babysitting work throughout 2010, and completing a four-year degree in 2012. AR 31,
13 28.

14 Plaintiff argues that the part-time work caring for a 5-year-old does not reach the level of
15 substantial gainful activity, and involved "no physical activity other than driving ... less than 10
16 miles a day." Dkt. 18 at 1-2. However, regardless of the earnings, babysitting two to six hours
17 per day contradicts Plaintiff's testimony of incapacitating pain. Daily headaches lasting up to
18 eight hours, needing daily one- to two-hour naps, being unable to sit or stand for more than 10
19 minutes, and being unable to move her arms frequently would, taken together, make it difficult if
20 not impossible to care for a 5-year-old. The ALJ permissibly inferred that taking care of a 5-
21 year-old for up to six hours at a time required physical activity. *See Batson v. Comm'r, Soc. Sec.*
22 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) ("[T]he Commissioner's findings are upheld if
23 supported by inferences reasonably drawn from the record."). Plaintiff's babysitting activity

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 provided a clear and convincing reason to discount Plaintiff's testimony.

2 Plaintiff argues that she had accommodations for her back issues in order to complete her
3 four-year degree. Dkt. 16 at 10; Dkt. 18 at 2. However, the ability to complete a four-year
4 degree, even in five years, indicates a better ability to concentrate than Plaintiff testified she had.
5 See *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (upholding rejection of doctor's
6 opinion that claimant had "difficulty paying attention, concentrating, and organizing herself"
7 because it did not prevent her from obtaining a college degree).

8 Plaintiff argues that her daily household activities do not contradict her testimony
9 because she does them "with severe pain" and only for "a very short period of time." Dkt. 16 at
10 3. In addition, her children are largely self-sufficient. Dkt. 16 at 4. But Plaintiff reported that
11 she grocery shops once or twice a month for "3-4 hours," contradicting her testimony that she
12 cannot stand for more than 10 minutes at a time. AR 233. If childcare and housework were
13 erroneous reasons to discount Plaintiff's testimony, the error was harmless because the ALJ
14 provided several other clear and convincing reasons. See *Carmickle v. Comm'r, Soc. Sec.*
15 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (inclusion of erroneous reasons to discount
16 claimant's testimony was harmless because "remaining valid reasons supporting the ALJ's
17 determination are not 'relatively minor'").

18 The ALJ did not err by discounting Plaintiff's testimony based on her activities.

19 **2. Conservative Treatment**

20 Plaintiff acknowledges that she avoids pain medications. Dkt. 18 at 3⁴; AR 31. An
21

22 ⁴ Plaintiff also offers reasons why she avoided antidepressant medications. Dkt. 16 at 2. The
23 Court need not address this issue, however, because the ALJ did not rely on that as a reason to
discount her testimony.

1 “unexplained or inadequately explained failure” to seek treatment or follow prescribed treatment
2 can be a valid reason to discount a claimant’s testimony, but an ALJ must consider a claimant’s
3 proffered reasons. *Trevizo v. Berryhill*, 871 F.3d 664, 679-80 (9th Cir. 2017). Plaintiff states in
4 her reply brief that she “refuses to take medications that make her feel weird in the head and
5 prevent her from leading as normal a life as possible.” Dkt. 18 at 3.⁵ The record available to the
6 ALJ reflects that Plaintiff told her treating doctor in 2015 that she was “not big on medications”
7 and “would rather live with the pain than take lots of medications.” AR 1370. Although other
8 interpretations of the record are possible, the Court must uphold the ALJ’s rational interpretation
9 that Plaintiff’s avoidance of medication indicated that her pain was not incapacitating. *See*
10 *Burch*, 400 F.3d 676, 680-81 (when the evidence is susceptible to more than one interpretation,
11 the ALJ’s interpretation must be upheld if rational).

12 Because the ALJ provided the clear and convincing reasons of conflict with activities as
13 well as conservative treatment, the Court concludes the ALJ did not err by discounting Plaintiff’s
14 symptom testimony.

15 **C. Heather Nash, F.N.P.-C.**

16 Plaintiff argues that Ms. Nash’s opinions should have been given “significant weight”
17 because she treated Plaintiff for several years. Dkt. 18 at 5. The ALJ gave Ms. Nash’s opinions
18 “partial weight,” accepting her lifting limits but rejecting the limit to sitting four hours per day.
19 AR 33. The ALJ found that Ms. Nash herself acknowledged that the opined limits were based
20 on Plaintiff’s self-reports, not objective medical evidence. AR 33. The ALJ was permitted to

21 ⁵ This Court cannot make its own findings. *Connett*, 340 F.3d at 874 (“we cannot rely on
22 independent findings of the district court. We are constrained to review the reasons the ALJ
23 asserts.”). Accordingly, the Court does not rely on any assertions made in briefing and not found
in the record available to the ALJ.

1 discount Ms. Nash's opinions for this reason. An ALJ may reject even a treating physician's
2 opinion if it is based largely on a claimant's self-reports that have been properly discounted.
3 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). As discussed above, the ALJ
4 permissibly discounted Plaintiff's self-reports.

5 The Court concludes the ALJ did not err by discounting Ms. Nash's opinions.

6 **D. Elizabeth St. Louis, M.D.**

7 Plaintiff notes that Dr. St. Louis found she had severe impairments and argues the ALJ
8 erred by "dismiss[ing]" this information. Dkt. 18 at 4. There is no dispute that Plaintiff has
9 severe impairments, including a perineural (or Tarlov) cyst. *See* AR 27. Dr. St. Louis opined
10 that Plaintiff had *less severe* limitations than the ALJ found. For example, she found Plaintiff
11 could stand or walk for six hours per day, while the ALJ limited Plaintiff to two hours per day.
12 *Compare* AR 1148 *with* AR 30. Plaintiff was not prejudiced by the ALJ's discounting of Dr. St.
13 Louis' opinions.

14 **E. Listing 1.04**

15 Plaintiff refers to Listing 1.04, and notes her perineural or Tarlov cyst, but does not show
16 how her impairments meet or medically equal the listing. *See* Dkt. 16 at 10, 11-12, 13, 14.
17 Listing 1.04 requires showing "compromise of a nerve root" along with one of three conditions:
18 "nerve root compression," "spinal arachnoiditis," or "[l]umbar spinal stenosis ... resulting in
19 inability to ambulate effectively." 20 C.F.R. Pt. 404, Subpt. P, App'x 1, § 1.04. The ALJ found
20 that Plaintiff did not have any of the three conditions. AR 29-30. Plaintiff has not shown any
21 error. The Court concludes the ALJ did not err by finding Plaintiff's impairments did not meet
22 or equal Listing 1.04.

23
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 **F. Frank Feigenbaum, M.D.**

2 Plaintiff refers to “findings” from Dr. Feigenbaum and states that he “reviewed [her]
3 MRI’s.” Dkt. 16 at 12, 2. The record does not appear to contain any findings or opinions from
4 Dr. Feigenbaum, however. *See* Dkt. 13, Court Transcript Index. Plaintiff’s opening brief lists
5 Dr. Feigenbaum’s website, but the website reveals nothing about Plaintiff’s impairments or
6 limitations. *See* Dkt. 16 at 19. The ALJ did not err by failing to consider evidence that is not to
7 be found anywhere in the record.

8 **G. Cherry picking**

9 Plaintiff argues that the ALJ “picked out” the information from the record that supports
10 his conclusion that she is not disabled. Dkt. 18 at 5. An ALJ is required to examine the evidence
11 in context and not simply pick out a few isolated instances of improvement. *Attmore v. Colvin*,
12 827 F.3d 872, 877 (9th Cir. 2016). However, as discussed above, the ALJ permissibly
13 discounted Plaintiff’s testimony and Ms. Nash’s opinions. The remainder of the record, such as
14 Dr. Adler’s report and the Community Services Northwest assessment, is consistent with the
15 ALJ’s findings. AR 1083, 966; *see also* AR 1594 (“objective findings [for back] have been
16 essentially normal”).

17 **H. Vocational Testimony**

18 At the hearing, the ALJ presented the vocational expert with a hypothetical that included
19 all of the limitations in the RFC. AR 66-67, 68, 74, 76-77. The vocational expert testified that a
20 person with those limitations could perform jobs that existed in significant numbers in the
21 national economy. AR 76-78. The ALJ relied on this testimony to conclude that Plaintiff was
22 not disabled for Social Security purposes. AR 35.

23 Plaintiff argues that, if her testimony was incorporated into the hypothetical, “then the
ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 finding would have been different.” Dkt. 16 at 16. That is true. Plaintiff’s attorney asked the
2 vocational expert several alternative hypotheticals, including whether a person who needed to lie
3 down for an hour a day outside of normal breaks could sustain employment. AR 80-81. The
4 vocational expert testified that such a person could not sustain employment. AR 81. However,
5 an ALJ need only include in the RFC limitations that are supported by the record. *Robbins*, 466
6 F.3d at 886. Here, the ALJ permissibly discounted Plaintiff’s testimony, as discussed above, and
7 thus was not required to account for Plaintiff’s self-reported limitations. The ALJ included all
8 limitations that were supported by the record in the hypothetical he presented to the vocational
9 expert, and thus was permitted to rely on the expert’s response.

10 The Court concludes the ALJ did not err in relying on the vocational expert’s testimony
11 to establish that Plaintiff could perform jobs available in significant numbers in the national
12 economy.

13 CONCLUSION

14 For the foregoing reasons, the Commissioner’s final decision is **AFFIRMED** and this
15 case is **DISMISSED** with prejudice.

16 DATED this 2nd day of July, 2019.

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19 The Honorable Richard A. Jones
20 United States District Judge

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23 ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE